

PATRICIA A. CUTLER, Assistant U.S. Trustee (#50352)
STEPHEN L. JOHNSON, Trial Attorney (#145771)
EDWARD G. MYRTLE, Trial Attorney (DC#375913)
U.S. Department of Justice
Office of the United States Trustee
250 Montgomery Street, Suite 1000
San Francisco, CA 94104
Telephone: (415) 705-3333
Facsimile: (415) 705-3379

Attorneys for United States Trustee
Linda Ekstrom Stanley

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	No.	01-30923 DM
PACIFIC GAS & ELECTRIC COMPANY,)	Chapter	11
Debtor.)	[Not set for hearing]	

UNITED STATES TRUSTEE'S
OBJECTION TO APPLICATION OF DEBTOR FOR AN ORDER
PURSUANT TO SECTIONS 327(a) AND 328(a)
EMPLOYING DRESDENER KLEINWORT & WASSERSTEIN

The United States Trustee objects to debtor's application for an order employing Dresdener Kleinwort Wasserstein, Inc. ("DKW") as Financial Advisor (the "Application"). The Application should not be granted because (1) it purports to fix compensation under 11 U.S.C. § 328(a) without regard to the reasonableness requirement of § 330; (2) it contains an "indemnity" agreement which is more nearly a release and which imposes an administrative burden on the estate without court intervention; (3) it suggests litigation over the agreement between DKW and the estate must be conducted in New York; (4) it contains a contract termination fee of \$22 million payable even if debtor terminates the firm for cause.

Argument

The United States Trustee is responsible for, *inter alia*, supervising "the administration of cases . . . under chapter . . . 11" of the Code and is given discretion to file comments with the court with respect to applications for employment of professional persons. 28 U.S.C. § 586(a)(3).

The United States Trustee has the following objections to the Application:

1. DKW Has No Obligation To Request Court Approval Of Its Monthly Fees

Sections 327 and 328(a) give the debtor great flexibility in employing professionals and setting the terms of that employment. Neither of those sections trumps § 330(a) or Federal Rule of Bankruptcy Procedure 2016(a), though, which require professionals file proper fee applications for interim compensation. DKW's proposed terms of employment require the debtor pay the firm \$350,000 per month (with moderate decreases in later months) under § 328(a). DKW does not have any intention of file fee applications.

The court should not approve this procedure. The applicant has the burden of demonstrating an entitlement to fees from a bankruptcy estate. DKW cannot demonstrate it has added any value to the bankruptcy estate without filing papers describing its contribution and the effects of the contributions. It is not possible to determine whether the fees are reasonable without a submission describing the work and its results.

2. The "Indemnity" Agreement Conflicts with Bankruptcy Law

The proposed employment calls upon the court to approve an "indemnity agreement" between the estate and DKW. The "indemnity" is inconsistent with bankruptcy law in several respects: (1) it violates § 330 because it permits DKW to charge the estate for the costs of indemnification without a court order and court supervision of those costs; (2) it is "unreasonable" because it is inconsistent with DKW's fiduciary obligation to the estate; and (3) it causes the estate to indemnify a professional for its own wrongful acts. The "indemnity" is more like a release. If debtor wishes to give a release of this nature, it should at a minimum give notice to creditors of its intentions. For these reasons, the "indemnity" should not be approved.

3. The "Indemnity" Compels Use of New York Court

The "Indemnity" Agreement strongly suggests that any dispute over the employment relationship between debtor and DKW will be litigated before a New York court. See ¶ 11 of the Indemnity. There is no reason for this provision. The bankruptcy court must pass on the allowability of fees in the bankruptcy case under 11 U.S.C. § 330 and it can determine whether there is a basis for concluding the work was improperly done. It is inconsistent with the Court's supervision of the case to require any suit over DKW's work be litigated in New York.

4. The \$22 Million Termination Fee is Not Justified

Any request for employment must be on "reasonable" terms. 11 U.S.C. §§ 327, 328(a). The Application calls for a termination fee of \$22 million in the event KWP is terminated by debtor, regardless of whether there is cause or not and, apparently, without any court approval. This provision is completely at odds with 11 U.S.C. § 330(a) and inconsistent with the court's plenary review of fees in bankruptcy cases. It should not be approved.

For the foregoing reasons, the United States Trustee objects to an order of employment for DKW.

Date: May ___, 2001

Respectfully submitted,

Patricia A. Cutler
Assistant United States Trustee

By: -----DRAFT-----
Stephen L. Johnson
Attorneys for United States Trustee